Federal Court of Appeal | Cour d'appel fédérale

Date: 20250219

Docket: A-217-23

Citation: 2025 FCA 41

CORAM: **BOIVIN J.A.**
RENNIE J.A.
LASKIN J.A.

BETWEEN:

ANNETTE LANCE

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Heard at Ottawa, Ontario, on February 19, 2025.
Judgment delivered from the Bench at Ottawa, Ontario, on February 19, 2025.

REASONS FOR JUDGMENT OF THE COURT BY: RENNIE J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario, on February 19, 2025).

RENNIE J.A.

[1] The applicant, Annette Lance, brings this application for judicial review of a decision of the Appeal Division of the Social Security Tribunal, reversing a decision of the General Division. The Appeal Division held that the General Division erred in applying the test for misconduct, and thus found, in the applicant's circumstances, she was disqualified from receiving benefits under the Employment Insurance Act, S.C. 1996, c. 23 (the Act).

[2] By way of background, the applicant worked in the Huron Perth Healthcare Alliance Hospital, in Stratford, Ontario. On August 17, 2021, Ontario's Chief Medical Officer of Health issued a directive under s. 77.7 of the *Ontario Health Protection and Promotion Act*, R.S.O. 1990, c. H.7 requiring all public health employees to be vaccinated against Covid-19. According, the hospital issued a policy requiring employees to be vaccinated. The applicant, while fully aware of the hospital's policy and the consequences of non-compliance, refused to comply. She did not seek an exemption from vaccination under the hospital's policy. She was at first suspended from her work and eventually dismissed. While suspended, she applied for benefits under the Employment Insurance Act. The Commission, in accordance with sections 29-31 of the Act, refused her request as she had been suspended from her employment due to misconduct.

[3] The General Division granted the applicant's appeal on the basis that neither an express nor implied term of the applicant's collective agreement or employment contract required her to be vaccinated. The General Division also reasoned that there was no legislation that required hospital employees be vaccinated, and that it was simply the employer's choice to impose the requirement.

[4] The Commission sought, and obtained, leave to appeal.

[5] At the hearing for leave to appeal, the applicant argued that the member was not impartial as he indicated a doubt whether that the General Division decision was correctly decided and had previously decided cases involving loss of employment for failure to comply with an employer's vaccination policy. The member refused to recuse himself and granted leave. The applicant then

prevailed on the Vice Chair of the Tribunal to constitute a panel of three members. Typically, appeals are decided by one member. We mention this only because the applicant argues before us that the Appeal Division was biased.

[6] Turning to the substance of the application before us, the Appeal Division can overturn a decision of the General Division where there has been a breach of procedural fairness, findings of fact made without regard to the evidence, or where there has been an error of law. (*Department of Employment and Social Development Act,* S.C. 2005, c 34, ss. 55, 56(1). In our view, it was right to intervene in these circumstances.

[7] The Employment Insurance Act governs the relationship between the unemployed person and any entitlement to benefits, not the employee's contract of employment. The Act provides that benefits are payable only if the loss of employment is involuntary (sections 29-31). The Act itself does not define misconduct – that has been left to the Social Security Tribunal and this Court, which has held that misconduct occurs where an employee choses to engage in conduct which would impair the performance of their duties (*Mishibinijima v. Canada (Attorney General)* 2007 FCA 36 at para. 14).

[8] Consequently, the only question is whether the employee was aware or ought to have been aware of the employer's policy, the consequences of failing to comply with that policy and engaged in conduct which, objectively, could lead to a loss of employment. Questions such as whether the dismissal was unfair or unjust, whether the policy was well founded, whether there were options short of dismissal and whether the policy or dismissal conformed to the collective

agreement are irrelevant to the inquiry as to whether the claimant is entitled to benefits (*Cecchetto v. Canada (Attorney General)* 2024 FCA 102 (leave to appeal dismissed SCC number 41441, February 13, 2025), *Kuk v. Canada (Attorney General)* 2024 FCA 74 at paras. 8-9, *Sullivan v. Canada (Attorney General)* 2024 FCA 7 at para 4; *Zhelkov v. Canada (Attorney General)* 2023 FCA 240 at para. 3).

[9] The General Division erroneously focused on the merits of the Huron Perth Hospital's policy and the employment contract as opposed to the conduct of the applicant. It erred in law in considering whether the hospital's policy was fair, legal, complied with the Charter, violated the employee's human rights or the terms of a collective agreement. The only question that the General Division ought to have asked was whether the employee knew or ought to have known of the policy, the consequences of non-compliance, and voluntarily chose not to comply.

[10] The Appeal Division determined that the applicant had notice of the employer's policy, was aware of the consequences of non-compliance and made a conscious decision not to comply. Applying the law correctly, it concluded that her loss of employment was voluntary, which disentitled her to any claim for benefits in accordance with sections 29-31 of the Act. There is no error in this analysis.

[11] Before us, the applicant has maintained her argument that the Appeal Division was biased. Suffice to say that there is no evidentiary foundation this argument. The fact that the Appeal Division applied the law consistent with its prior jurisprudence does not give rise to an apprehension of bias or lack of impartiality.

[12] The application will therefore be dismissed with costs.

"Donald J. Rennie"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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